

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on February 24, 2022 at 1:30 p.m., or as soon thereafter as the matter can be heard, by video conference or in-person as directed by the Court, in the courtroom of the Hon. Edward M. Chen, Courtroom 5 of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Defendant Johnson & Johnson Consumer Inc. (erroneously sued as “Johnson & Johnson Consumer, Inc.”) (“JJCI”) will and hereby does move this Court to dismiss this action, with prejudice.

JJCI's Motion is made pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the following grounds:

- (1) Plaintiff lacks standing to assert nationwide class claims under California law on behalf of unidentified putative class members in states outside California and lacks standing to assert class claims under the laws of other states;
- (2) Plaintiff lacks standing to represent the putative class because she does not plausibly allege a legally cognizable injury that is fairly traceable to JJCI;
- (3) Plaintiff lacks standing to represent the putative class for alleged injuries from sunscreen products that she did not actually use or purchase, as she admits that the product she allegedly purchased is not the same as the sunscreen products allegedly purchased by the putative class members;
- (4) Plaintiff's unjust enrichment claims fail because Plaintiff lacks standing to seek equitable relief and also has not demonstrated that an adequate remedy at law is unavailable;
- (5) Plaintiff's failure to plead an injury—an essential element of each individual and class claim—warrants dismissal of the Amended Complaint in its entirety under Rule 12(b)(6);
- (6) Plaintiff's claims for fraud (intentional misrepresentation and concealment) and negligent misrepresentation fail to meet the heightened pleading standards under Rule 9(b);
- (7) Plaintiff fails to state claims for violation of California's Unfair Competition Law,

1 Consumers Legal Remedies Act, and False Advertising Law;

2 (8) Plaintiff fails to state claims for breach of warranty because Plaintiff does not

3 specify the terms of the alleged warranty and lacks privity with JJCI;

4 (9) Plaintiff's medical monitoring claims fail because Plaintiff's underlying tort

5 claims fail, and also because Plaintiff has not established that medical monitoring

6 damages are necessary or reasonable; and

7 (10) Plaintiff fails to state a claim for punitive damages because she does not plausibly

8 allege any facts demonstrating malice, oppression, or fraud by JJCI.

9 JJCI's Motion is based on this Notice of Motion and Motion to Dismiss, the

10 accompanying Memorandum of Points and Authorities, Plaintiff's Amended Complaint, all

11 other pleadings and papers on file in this action, any other matters upon which the Court may

12 take judicial notice, any oral argument presented at the hearing on this Motion, and any and all

13 materials the Court deems proper.

14 Dated: December 20, 2021

BARNES & THORNBURG LLP

16 By: /s/ Sandra M. Ko

17 James F. Murdica
 18 Sandra M. Ko
 19 Attorneys for Defendant
 JOHNSON & JOHNSON CONSUMER
 INC.

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1 **I. INTRODUCTION**

2 Plaintiff Elizabeth Bodle has brought a type of lawsuit that is nearly universally rejected—
 3 a class action seeking recovery for alleged personal injuries. Plaintiff asserts claims both
 4 individually and on behalf of a putative nationwide class of unnamed individuals who allegedly
 5 experienced undefined personal injuries resulting from their purported use of unidentified
 6 Neutrogena® sunscreens. Fundamentally, this action is nothing more than an improper attempt to
 7 convert Plaintiff’s individual claim for her own alleged personal injuries into a class action—even
 8 though the putative class members experienced no injury. While Plaintiff claims that she developed
 9 acute myeloid leukemia (“AML”) allegedly resulting from her sunscreen use, she does not identify
 10 any actual injuries experienced by the putative class beyond broad assertions of “harm,” “personal
 11 injuries” and “other forms of cancer.” Plaintiff pleads no facts to demonstrate that she has standing
 12 to bring this action or to plausibly state the claims asserted individually and on behalf of the putative
 13 class. Accordingly, the Amended Complaint should be dismissed for four overarching reasons:

14 **First**, Plaintiff does not plausibly allege a cognizable injury on behalf of the putative class
 15 that is fairly traceable to Johnson & Johnson Consumer Inc. (“JJCI”).¹ Not only does she fail to
 16 allege that she (or any of the putative class members) actually purchased or used any Neutrogena®
 17 sunscreen products that contained benzene, but she also fails to specify what “harm” or “personal
 18 injuries” that the putative class allegedly experienced or identify a causal link between those
 19 unspecified injuries and JJCI’s purported conduct. Without a legally cognizable injury traceable to
 20 JJCI, Plaintiff’s claims should be dismissed (1) pursuant to Rule 12(b)(1) for lack of Article III
 21 standing to assert claims on behalf of the putative class; and (2) pursuant to Rule 12(b)(6) for failure
 22 to establish an essential element (*i.e.*, injury/damages) of each individual and class claim.

23 **Second**, Plaintiff claims that she and the putative class purchased various Neutrogena®
 24 sunscreen products, but does not identify the actual products at issue—other than a single
 25 Neutrogena® sunscreen product that Plaintiff allegedly purchased. However, Plaintiff admits that

26 ¹ Plaintiff abbreviates the name of Defendant Johnson & Johnson Consumer Inc. as “Johnson &
 27 Johnson” in her Amended Complaint. *See* Dkt. 17, p. 2 at lines 4-5. However, Johnson & Johnson
 28 is a separate and distinct company from Johnson & Johnson Consumer Inc., which is referred to as
 “JJCI” throughout this Motion.

1 the sunscreen product that she purchased is ***not*** the same as “the other Sunscreens purchased by the
 2 Class.” Plaintiff cannot assert claims for injuries from sunscreen products that she did not actually
 3 purchase, and those claims should be dismissed under Rule 12(b)(6).

4 ***Third***, Plaintiff is a California resident seeking to represent a putative nationwide class, but
 5 can sue only under the laws of the state where she resides, was allegedly injured, or purportedly
 6 purchased the products at issue—*i.e.*, California. Plaintiff lacks standing to represent unidentified
 7 class members in other states. Moreover, Plaintiff cannot assert claims under the laws of other
 8 states, and due to material differences in state laws, Plaintiff’s warranty claims (Sixth Cause of
 9 Action), fraud-based claims (Seventh, Eighth, and Ninth Causes of Action), and consumer
 10 protection claims (Tenth, Eleventh, and Twelfth Causes of Action) cannot be asserted as nationwide
 11 claims. As such, Plaintiff’s claims on behalf of the putative nationwide class should be dismissed
 12 under Rule 12(b)(1) and/or 12(b)(6).

13 ***Finally***, Plaintiff’s claims fail for independent reasons. Plaintiff’s warranty claims (Sixth
 14 Cause of Action), fraud-based claims (Seventh, Eighth, and Ninth Causes of Action), consumer
 15 protection claims (Tenth, Eleventh, and Twelfth Causes of Action), and request for punitive
 16 damages all fail to meet the applicable pleading standards under Rules 8(a) and 9(b). Plaintiff’s
 17 medical monitoring claims (Fifth Cause of Action) fail because Plaintiff has not established that
 18 medical monitoring damages are necessary or reasonable, and medical monitoring damages are
 19 derivative to Plaintiff’s underlying tort claims, which all fail as a matter of law. The unjust
 20 enrichment claims (Thirteenth Cause of Action) also fail because Plaintiff lacks standing to seek
 21 equitable relief and has not demonstrated that an adequate remedy at law is unavailable.

22 **II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

23 **A. Procedural History.**

24 On October 4, 2021, Plaintiff filed her initial Class Action Complaint against JJCI, asserting
 25 claims under California’s Unfair Competition Law (“UCL”), Consumers Legal Remedies Act
 26 (“CLRA”), and False Advertising Law (“FAL”), and a claim for unjust enrichment/quasi-contract,
 27 seeking recovery for economic losses. *See* Complaint, Dkt. 1 (“Compl.”). Plaintiff defined the
 28 putative class as “[a]ll consumers who purchased any lotion or spray Sunscreen in the United States

1 for personal use or consumption.” *Id.* at ¶ 45. The Class Action Complaint did not assert any
 2 claims for personal injuries, nor did it allege that Plaintiff or any putative class member experienced
 3 any personal injuries resulting from their sunscreen use.

4 On October 15, 2021, the Clerk of the Judicial Panel on Multidistrict Litigation (“JPML”)
 5 entered a Conditional Transfer Order (“CTO”), conditionally transferring the instant action to the
 6 multidistrict litigation, *In re: Johnson & Johnson Aerosol Sunscreen Marketing, Sales Practices*
 7 and *Products Liability Litigation*, MDL No. 3015, pending in the Southern District of Florida
 8 (“MDL”). No. 3:21-cv-07742, Dkt. 1 (J.P.M.L. Oct. 15, 2021). Plaintiff subsequently filed a
 9 Notice of Opposition to the CTO, and a briefing schedule was set for Plaintiff’s Motion to Vacate
 10 due by November 5, 2021. *Id.* at Dkt. 4. On November 5, 2021, Plaintiff withdrew her objection
 11 to the conditional transfer of this case to the MDL, and filed the Amended Complaint, asserting
 12 new, previously undisclosed personal injury claims and seeking to assert them on behalf of a class
 13 of individuals who allegedly purchased and used unidentified products and sustained unidentified
 14 injuries. *See* Amended Complaint, Dkt. 17 (“Am. Compl.”). Following Plaintiff’s amendment, the
 15 JPML determined that a review of the Amended Complaint would be necessary to determine
 16 whether this case should remain on the CTO, and vacated the CTO on November 15, 2021. No.
 17 3:21-cv-07742, Dkt. 11 (J.P.M.L. Nov. 15, 2021).

18 **B. Claims Asserted and Relief Sought in the Amended Complaint.**

19 Plaintiff now seeks to certify a nationwide class of consumers, requesting relief for
 20 (1) personal injury, (2) economic injury, and (3) medical monitoring. In the Amended Complaint,
 21 Plaintiff asserts claims individually and on behalf of the putative class for Negligence (First Cause
 22 of Action), Negligent Failure to Warn (Second Cause of Action), Strict Liability – Design Defect
 23 (Third Cause of Action), Strict Liability – Failure to Warn (Fourth Cause of Action), Medical
 24 Monitoring (Fifth Cause of Action), Breach of Warranty (Sixth Cause of Action), Fraud –
 25 Intentional Misrepresentation (Seventh Cause of Action), Fraud – Concealment (Eighth Cause of
 26 Action), Negligent Misrepresentation (Ninth Cause of Action), Violations of the Unfair
 27 Competition Law, Cal. Bus. & Prof. Code § 17200 (Tenth Cause of Action), Violations of the
 28 Consumers Legal Remedies Act, Cal. Civil Code § 1750 (Eleventh Cause of Action), Violations of

1 the False Advertising Law, Cal. Bus. & Prof. Code § 17500 (Twelfth Cause of Action), and Unjust
 2 Enrichment (Thirteenth Cause of Action).

3 In the Amended Complaint, Plaintiff alleges that she purchased various Neutrogena®
 4 sunscreen products, but actually identifies only one: Ultra Sheer Dry-Touch Water Resistant
 5 Sunscreen Lotion SPF 70. Am. Compl. ¶¶ 1, 38. She contends that she was “recently diagnosed”
 6 with AML, and that, “[u]pon information and belief, Plaintiff’s use of the Sunscreen products was
 7 the sole cause or a substantial factor in causing her cancer.” *Id.* at ¶¶ 1, 70. Plaintiff does not,
 8 however, allege when or from whom she purchased the sunscreen, the amount of sunscreen she
 9 allegedly used, or the duration or frequency of her alleged purchase and/or use.

10 In addition to her individual claims, Plaintiff—a California resident—seeks to assert claims
 11 on behalf of a nationwide class of “[a]ll consumers who purchased any lotion or spray Sunscreen
 12 manufactured by ***JJCI or its subsidiaries*** in the United States for personal use or consumption
 13 and suffered personal injury as a result.” *Id.* at ¶ 45. Notably, although Plaintiff initially pleads
 14 that other consumers may also have developed AML “or other forms of cancer” following use of
 15 the products (*id.* at ¶ 35), Plaintiff’s class definition is broader and encompasses ***any*** personal injury
 16 resulting from use of any sunscreen product manufactured by any subsidiary of JJCI (*id.* at ¶ 45).

17 Plaintiff further contends that she and members of the putative class are now at an increased
 18 risk of developing “latent illness and disease, including but not limited to cancer.” *Id.* at ¶ 101. As
 19 a result, Plaintiff seeks compensatory and punitive damages, injunctive relief (*id.* at ¶ 4), and “a
 20 Court-supervised and administered trust fund and medical monitoring regime to compensate
 21 Plaintiff and members of the putative Class for their economic damages” (*id.* at ¶ 103).

22 **III. LEGAL STANDARD**

23 JJCI brings this Motion to Dismiss under Federal Rules of Civil Procedure 12(b)(1) and
 24 12(b)(6).² The Court should dismiss a complaint, pursuant to Rule 12(b)(1), where the face of the

26 ² JJCI does not challenge class certification in this Motion, but contends that a personal injury class
 27 action is inappropriate under Rule 23 because “[a] ‘mass accident’ resulting in injuries to numerous
 28 persons is ordinarily not appropriate for a class action because of the likelihood that significant
 questions, not only of damages but of liability and defenses of liability, would be present, affecting
 the individuals in different ways.” Fed. R. Civ. P. 23 Advisory Committee’s Supplemental Note.

1 complaint fails to demonstrate a basis for standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.
 2 3d 1136, 1139 (9th Cir. 2003); Fed. R. Civ. P. 8(a), 12(b)(1). “Standing is a ‘threshold matter’ that
 3 is necessary to establish subject matter jurisdiction.” *Sloan v. Gen’l Motors LLC*, 2017 WL
 4 3283998, at *3 (N.D. Cal. Aug. 1, 2017) (Chen, J.). To survive a motion to dismiss under Rule
 5 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, ‘to state a claim to
 6 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*
 7 *Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal is appropriate where the complaint
 8 suffers from “the lack of a cognizable legal theory or the absence of sufficient facts alleged under
 9 a cognizable legal theory.” *Balistreti v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

10 **IV. PLAINTIFF LACKS STANDING TO ASSERT PUTATIVE CLASS CLAIMS.**

11 **A. Plaintiff Cannot Assert Nationwide Claims.**

12 A named plaintiff seeking to represent a putative class can sue only under the laws of the
 13 state where she resides, was injured, or purchased the products at issue. *Jones v. Micron*
 14 *Technology, Inc.*, 400 F. Supp. 3d 897, 908-09 (N.D. Cal. 2019). Here, Plaintiff alleges that she is
 15 a resident of California, but does not allege that she purchased any product or was injured outside
 16 of California. Am. Compl. ¶ 38. Nevertheless, she seeks to represent a class of individuals across
 17 the United States and to assert claims under the laws of states where she admittedly does not reside.

18 1. Plaintiff, a California Resident, Cannot Represent Putative Class Members
 19 Whose Claims Fall Under Other States’ Laws.

20 This Court recently examined the question of whether a California resident named plaintiff
 21 lacked standing to “represent unnamed class members in states outside of California.” *Phan v.*
 22 *Sargento Foods, Inc.*, 2021 WL 2224260, at *13-14 (N.D. Cal. June 2, 2021) (Chen, J.). The Court

23 “[C]lass action certifications and products liability cases in this circuit . . . has not been luminous.”
 24 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1230 (9th Cir. 1996). Class actions for personal
 25 injuries “present a multitude of problems” because “[t]he major elements in tort actions for personal
 26 injury—liability, causation, and damages—may vary widely from claim to claim, creating a wide
 27 disparity in claimants’ damages and issues of defendant liability, proximate cause, liability of
 28 skilled intermediaries, comparative fault, informed consent, assumption of risk and periods of
 limitation.” *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 810 (1996). In *Stearns v.*
Select Comfort Retail Corp., the Court “noted the inherent difficulty of maintaining a class action
 arising from alleged personal injuries.” 763 F. Supp. 2d 1128, 1133, 1159 (N.D. Cal. 2010).

1 exercised its discretion to dismiss the nationwide class claims because the named plaintiff could
 2 not represent unidentified class members in states outside California. *Id.* In *Sultanis v. Champion*
 3 *Petfoods USA Inc.*, this Court revisited the question and held that “whether a plaintiff can bring
 4 claims on behalf of unnamed plaintiffs under the laws of states in which the named plaintiff does
 5 not reside or was injured is a matter of typicality, adequacy, and predominance under Rule 23, not
 6 Article III standing.” 2021 WL 3373934, at *6 (N.D. Cal. Aug. 3, 2021) (Chen, J.). The Court
 7 explained that “[j]ust because this question does not involve Article III standing does not mean that
 8 the Court does not have discretion to conclude at the pleadings stage that [plaintiff] does not satisfy
 9 the adequacy, typicality, or predominance requirements on behalf of unnamed plaintiffs in multiple
 10 other states where she does not reside or where she did not purchase the Products.” *Id.* at *7. As
 11 in *Phan*, this Court concluded in *Sultanis* that the named plaintiff lacked standing to “represent
 12 unnamed class members in states outside of California” but noted that its conclusion was reached
 13 “under Rule 23, not Article III.” *Id.* at *8.

14 Here, it is undisputed that Plaintiff is a resident of California, and there are no allegations
 15 in the Amended Complaint indicating that she was injured or purchased any sunscreen products
 16 outside of California. Yet, Plaintiff defines the putative class as “[a]ll consumers . . . **in the United**
 17 **States.**” Am. Compl. ¶ 45 (emphasis added). Applying this Court’s well-reasoned analyses from
 18 *Phan* and *Sultanis*, it follows that Plaintiff cannot assert claims under the laws of states outside
 19 California or represent unidentified class members in states outside California. Therefore, the
 20 nationwide class claims in the Amended Complaint should be dismissed at this stage.

21 2. Claims Under California Law on Behalf of the Nationwide Class Fail.

22 Plaintiff cannot apply California law extraterritorially to a nationwide class. *Jones*, 400 F.
 23 Supp. 3d at 908-09. Specifically, she cannot assert claims for violations of California’s consumer
 24 protection laws (Tenth, Eleventh, and Twelfth Causes of Action), fraud (Seventh and Eighth Causes
 25 of Action), or breach of warranty (Sixth Cause of Action) on behalf of a nationwide class.

26 a. Plaintiff Cannot Assert Nationwide Consumer Protection Claims.

27 By alleging violations of California consumer protection laws on behalf of a nationwide
 28 class, Plaintiff essentially seeks to bind putative class members to California law, though they

1 neither reside in California nor purchased or used a Neutrogena® sunscreen product in California.
2 *See Mazza v. Am. Honda Motor Co.*, 666 F. 3d 581, 594 (9th Cir. 2012) (precluding application of
3 California law on a nationwide basis as a matter of law). Due to the “material differences in state
4 laws, states’ interests in applying their own laws, and states’ impaired ability to protect consumers
5 within their borders if California law were to apply . . . each plaintiff’s individual claims must be
6 governed by the laws of their home state.” *Vinci v. Hyundai Motor Am.*, 2018 WL 6136828, at
7 *10 (C.D. Cal. Apr. 10, 2018); *Glenn v. Hyundai Motor Am.*, 2016 WL 3621280, at *10 (C.D. Cal.
8 June 24, 2016) (“differences in scienter, the availability of class actions, the potential remedies, the
9 statute of limitations period, what constitutes actionable conduct, and the burden of proof”
10 prohibited application of California consumer protection laws to non-residents’ claims); *Cadena v.*
11 *Am. Honda Motor Co.*, 2019 WL 3059931, at *8 (C.D. Cal. May 29, 2019) (dismissing nationwide
12 class claims because “the other 49 states’ consumer protection statutes differ significantly from
13 California’s UCL, FAL, and CLRA”). Thus, the nationwide consumer protection claims fail.

b. Plaintiff Cannot Assert Nationwide Fraud Claims.

15 Similarly, the differences in the law for each state’s common law fraud claims are
16 numerous, material, and dispositive. Specifically, there are material differences in (1) the kind or
17 degree of reliance necessary to prove a claim; (2) the statutes of limitation; (3) a defendant’s duty
18 to disclose; (4) scienter requirements; (5) the standard of proof; and (6) available damages. *See*
19 *Darissee v. Nest Labs, Inc.*, 2016 WL 4385849, at *2 (N.D. Cal. Aug. 15, 2016) (conducting analysis
20 of state common law fraud claims and holding that “material variations” preclude application of
21 California’s fraud law on a nationwide basis).

c. Plaintiff Cannot Assert Nationwide Breach of Warranty Claims.

23 Further, Plaintiff's attempt to assert nationwide claims for breach of California warranty
24 law fails because California warranty law cannot be applied to a nationwide class. *Victorino v.*
25 *FCA US LLC*, 326 F.R.D. 282, 297 (S.D. Cal. 2018) (finding that plaintiffs failed to demonstrate
26 that due process would not be violated by application of California warranty law to nationwide
27 class); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 991 (N.D. Cal. 2009) (doubting that a nationwide
28 class action is the superior method for adjudicating a breach of warranty claim). State warranty

1 laws vary significantly and, here, preclude certification of a nationwide class. *See Vinci*, 2018 WL
 2 6136828, at *8 (striking nationwide warranty claims because “there are material differences
 3 between California warranty law and all the other states’ warranty laws, as to various elements
 4 including privity, reliance, notice, etc.”). Pursuing this cause of action under California law on
 5 behalf of unknown individuals throughout the United States necessarily fails because Plaintiff
 6 cannot allege that the putative class satisfies each element of a warranty claim.

7 **B. Plaintiff Lacks Article III Standing Because She Does Not Plausibly Allege a
 8 Cognizable Injury That is Fairly Traceable to JJCI.**

9 Plaintiff fails to plead facts that demonstrate she has standing to bring this action on behalf
 10 of herself or the putative class. Plaintiff must allege and show: “(1) an injury-in-fact that is actual
 11 or imminent and concrete and particularized, not conjectural or hypothetical, (2) that is fairly
 12 traceable to the defendant’s challenged conduct, and (3) is likely to be redressed by a favorable
 13 judicial decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiff lacks standing
 14 to assert claims on behalf of the putative class because (1) she does not allege that she actually
 15 purchased or used any Neutrogena® sunscreen product contaminated with benzene; (2) she cannot
 16 assert claims for products she did not purchase; (3) she cannot assert claims for injuries she did not
 17 sustain; and (4) vague allegations regarding the products at issue and the overgeneralized link
 18 between unidentified injuries and JJCI’s alleged conduct is too remote to establish traceability.

19 **1. Plaintiff Fails to Plead Purchase or Use of a Contaminated Sunscreen.**

20 In order to meet the injury-in-fact element for Article III standing, a plaintiff must “allege
 21 an injury to [her]self that is ‘distinct and palpable,’ as opposed to merely ‘[a]bstract,’ and the
 22 alleged harm must be actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Whitmore v. Ark.*,
 23 495 U.S. 149, 155 (1990) (citations omitted).

24 Plaintiff does not allege that she actually purchased or used any sunscreen products
 25 containing benzene. *See* Am. Compl. ¶¶ 36, 38. Instead, Plaintiff’s allegations amount to nothing
 26 more than mere conjecture that, because she purchased a single Neutrogena® sunscreen product at
 27 some unspecified time, and some batches of some Neutrogena® sunscreen products were allegedly
 28 found to contain varying levels of benzene according to Valisure’s Citizen Petition, Plaintiff *might*

1 have purchased sunscreen with benzene. *See id.* at ¶ 36; *see also id.* at ¶¶ 3, 16, 39, 168 (alleging
 2 that “the Sunscreen **may** contain benzene”). This supposition does not, however, satisfy the injury-
 3 in-fact requirement because it fails to affirmatively allege an injury from those products to Plaintiff,
 4 and it would be mere conjecture to find that a Neutrogena® sunscreen product was the cause of
 5 Plaintiff’s AML, particularly where Plaintiff admits that the sunscreen products only “**may**”
 6 contain benzene but does not allege any facts to demonstrate actual exposure to benzene. “In a
 7 toxic tort case, a plaintiff must first show that he or she was actually exposed to a toxic substance
 8 because ‘[i]f there has been no exposure, there is no causation.’” *Avila v. Willits Envtl. Remediation*
 9 *Tr.*, 2009 WL 1813125, at *4 (N.D. Cal. June 18, 2009) (citing *Ferris v. Gatke Corp.*, 107 Cal.
 10 App. 4th 1211, 1220, n.4 (2003)). Plaintiff’s failure to allege that she purchased or used any
 11 benzene-contaminated Neutrogena® sunscreen product omits a fundamental requirement to
 12 proving that her AML is an injury in fact that she received from JJCI’s product.

13 2. Plaintiff Cannot Allege an Injury from Products She Did Not Purchase.

14 Plaintiff alleges that she purchased Neutrogena® Ultra Sheer Dry-Touch Water Resistant
 15 Sunscreen Lotion SPF 70 (“Purchased Sunscreen”) and “some or all of” other unidentified
 16 sunscreen products. However, the Purchased Sunscreen is **not** the same sunscreen product that was
 17 allegedly purchased by the putative class members (“Unpurchased Sunscreens”), which are also
 18 unidentified. *Id.* at ¶ 38; *see also id.* at ¶ 39 (admitting that “the specific Sunscreen purchased by
 19 the Plaintiff” is not the same as “the other Sunscreens purchased by the Class”). Thus, Plaintiff
 20 lacks Article III standing to assert claims as to the Unpurchased Sunscreens because she has not
 21 plausibly alleged that she “suffered an injury in fact” with respect to them. *Lujan*, 504 U.S. at 560.

22 Courts regularly dismiss class action claims where, as here, plaintiffs allege defects in
 23 products they did not purchase. *See, e.g., Mlejneky v. Olympus Imaging Am. Inc.*, 2011 WL
 24 1497096, at *4 (E.D. Cal. Apr. 19, 2011) (dismissing claims for lack of standing as to unpurchased
 25 product, even though the unpurchased product appeared in the same advertisements as the
 26 purchased product, and plaintiff alleged the same defect); *Herskowitz v. Apple Inc.*, 940 F. Supp.
 27 2d 1131, 1150 (N.D. Cal. 2013) (Chen, J.) (dismissing complaint for “failure to allege facts
 28 sufficient to state a claim and demonstrate standing regarding products they did not purchase”).

1 Plaintiff attempts to plead around this fatal defect by alleging that the Purchased Sunscreen
 2 and Unpurchased Sunscreens are “substantially similar” because they were all purportedly
 3 “marketed and labeled the same way – as ‘sunscreen.’” Am. Compl. ¶ 39. But, “[w]hen a complaint
 4 fails to adequately allege how products a plaintiff purchased are in fact substantially similar to
 5 products that the plaintiff challenges, the Court must dismiss the complaint to the extent it seeks to
 6 bring claims on the basis of unpurchased products.” *Tabler v. Panera LLC*, 2019 WL 5579529, at
 7 *10 (N.D. Cal. Oct. 29, 2019). In *Tabler*, the plaintiff made the same argument as Plaintiff; namely,
 8 that “the Whole Grain Bagel” and “other bread products” that the plaintiff purchased were
 9 “substantially similar” to the “unspecified other ‘bread products’” purchased by the putative class.
 10 *Id.* at *9. The court granted the motion to dismiss “to the extent the allegations are based on
 11 Products that Plaintiff did not purchase[,]” noting that “[t]he complaint never defines ‘bread
 12 product,’ and in fact, the complaint is wholly devoid of details about any of the ‘bread products’
 13 that Plaintiff purchased or the Products that Plaintiff seeks to challenge.” *Id.* (emphasis removed).

14 Similarly, here, the Amended Complaint does not actually define “Sunscreens” and lacks
 15 any details about the “Sunscreens” that the putative class members allegedly purchased. Plaintiff
 16 highlights 23 Neutrogena® sunscreen product batches that were, according to Valisure, allegedly
 17 found to have concentrations of benzene between 0.1 and 2.0 parts per million (“ppm”) and over
 18 2.0 ppm (Am. Compl. ¶¶ 13-14), but alleges that she purchased only a single Neutrogena®
 19 sunscreen product. And although she identifies the name of that single product, she never identifies
 20 when, where, or how many times she purchased the product, the batch or lot numbers for the
 21 product, or provide any other identifying information about the product that would demonstrate
 22 whether the Purchased Sunscreen is substantially similar to the Unpurchased Sunscreens. *Id.* at
 23 ¶ 38. Further, while Plaintiff alleges that the putative class action is brought on behalf of “users of
 24 certain sunscreen products manufactured, marketed, distributed, and sold by [JJCI] under the brand
 25 name ‘Neutrogena’” (*id.* at ¶ 4), she also broadly identifies the products at issue in the “Class”
 26 definition as “any lotion or spray Sunscreen manufactured by [JJCI] or its subsidiaries” (*id.* at
 27 ¶ 45). Despite these allegations, and just like the *Tabler* plaintiff, Plaintiff does not identify the
 28 Unpurchased Sunscreens, and the Amended Complaint is “wholly devoid of details” about them.

1 Moreover, the mere fact that the Purchased Sunscreen and the Unpurchased Sunscreens both fall
 2 within the broad category of “sunscreen” is not a sufficient basis to find that they are all
 3 substantially similar for purposes of a standing analysis.

4 3. Plaintiff Cannot Assert Claims for Injuries That She Did Not Sustain.

5 It is well settled that “named plaintiffs . . . must allege and show that they personally have
 6 been injured, not that injury has been suffered by other, unidentified members of the class.” *Lewis*
 7 *v. Casey*, 518 U.S. 343, 357 (1996). While Plaintiff alleges that she developed AML, she asserts
 8 only that unnamed individuals in the putative class were “harmed and suffered personal injuries”
 9 and that they developed AML or other, unspecified “forms of cancer.” Am. Compl. ¶¶ 35-36.
 10 Although Plaintiff may assert a claim for her own personal injuries (*i.e.*, relating to her development
 11 of AML, as alleged in the Amended Complaint) in an individual capacity (*i.e.*, not as a consumer
 12 class representative), she cannot convolute her individual claim into a class action where she has
 13 failed to identify any actual injuries purportedly experienced by the putative class members.
 14 Plaintiff contends that the putative class members experienced broad “harm” and “personal
 15 injuries” and developed “other forms of cancer.” *Id.* However, she fails to demonstrate that these
 16 are injuries that she personally sustained, rather than injuries sustained only by “other, unidentified
 17 members of the class.” *Senne v. Kansas City Royals Baseball Corp.*, 114 F. Supp. 3d 906, 910
 18 (N.D. Cal. 2015) (citations and quotations omitted)). Accordingly, Plaintiff lacks standing to assert
 19 such claims on behalf of the putative class.

20 4. Plaintiff Fails to Allege Injuries Traceable to JJCI.

21 Even if Plaintiff were able to allege a cognizable injury incurred by the putative class, she
 22 does not and cannot trace any such injury to JJCI’s conduct. First, and fatal to the standing inquiry,
 23 Plaintiff does not allege that she purchased or used any sunscreen products containing benzene.
 24 *See* Am. Compl. ¶¶ 36, 38. Moreover, Plaintiff does not identify the specific sunscreen product(s)
 25 that allegedly caused her to develop AML; rather, she only broadly asserts, “[u]pon information
 26 and belief,” that her “use of the Sunscreen products was the sole cause or a substantial factor in
 27 causing her cancer” without identifying **which** products she allegedly used. *Id.* at ¶ 54.

28 As to the putative class, Plaintiff provides even less detail, asserting generally that the class

1 members “purchased any lotion or spray Sunscreen manufactured by [JCI] or its subsidiaries . . .
 2 for personal use or consumption and suffered personal injury as a result[,]” but accompanied by
 3 varying, potentially conflicting allegations. *Id.* at ¶ 45; *see also id.* at ¶¶ 13-14 (highlighting 23
 4 different products tested by Valisure without defining the “Sunscreen products” at issue); *id.* at ¶ 4
 5 (bringing putative class action on behalf of users of “certain sunscreen products manufactured,
 6 marketed, distributed, and sold by [JCI] under the brand name “Neutrogena”). The attempted link
 7 between the putative class members’ use of the unidentified “Sunscreen products” allegedly sold
 8 by JCI and the unspecified “physical harm they have suffered” (*see, e.g., id.* at ¶ 130) is confusing
 9 and tenuous at best, and does not plausibly allege a causal chain necessary for standing. *See Riva*
 10 *v. Pepsico, Inc.*, 82 F. Supp. 3d 1045, 1053, n.3 (N.D. Cal. 2015) (Chen, J.).

11 **C. Plaintiff Lacks Standing to Pursue Injunctive Relief.**

12 Plaintiff seeks to enjoin JCI from selling “the Sunscreens,” and requests injunctive relief
 13 that the Court deems proper. This request must be dismissed because (1) Plaintiff has not alleged
 14 that she will suffer any future harm; and (2) Plaintiff has an adequate remedy at law.

15 1. Plaintiff Has Not Alleged That She Will Suffer Any Future Harm.

16 To establish standing to seek injunctive relief, a plaintiff must “‘demonstrate that [he or she]
 17 suffered or [are] threatened with a ‘concrete and particularized’ legal harm, coupled with a
 18 ‘sufficient likelihood that [they] will again be wronged in a similar way.’” *Joslin v. Clif Bar & Co.*,
 19 2019 WL 5690632, at *2 (N.D. Cal. Aug. 26, 2019) (quoting *Bates v. United Parcel Serv., Inc.*,
 20 511 F.3d 974, 985 (9th Cir. 2007)).

21 Specifically, Plaintiff’s requested injunctive relief—that JCI no longer sell the unidentified
 22 sunscreen products—would do nothing to redress her alleged injuries. Plaintiff does not allege that
 23 she intends to purchase a JCI sunscreen product in the future or even has any desire to do so. To
 24 the contrary, Plaintiff states that “[h]ad [she and members of the putative Class] known and
 25 understood the true nature and quality of the Sunscreens, Plaintiff and other members of the putative
 26 Class would not have purchased the Sunscreens.” *See, e.g., Am. Compl. ¶ 153; see also Deitz v.*
 27 *Comcast Corp.*, 2006 WL 3782902, at *3 (N.D. Cal. Dec. 21, 2006) (finding that plaintiff had no
 28 standing to pursue injunctive relief against defendant cable provider where there was no allegation

1 that he would subscribe to the provider in the future); *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d
2 992, 997 (N.D. Cal. 2007) (dismissing for lack of standing to pursue injunctive relief because “any
3 injury allegedly suffered as a result of Defendant’s conduct appears to lie solely in the past”).
4 Because Plaintiff has not alleged that she purchased a sunscreen product that contained benzene,
5 Plaintiff has not alleged that she has a present injury—much less that she is at risk of experiencing
6 a “real and immediate threat of repeated injury.” *Joslin*, 2019 WL 5690632, at *2. Further, injuries
7 to putative, unnamed class members do not confer standing on the named plaintiff. *Hodgers-*
8 *Durgin v. de la Vina*, 199 F. 3d 1037, 1045 (9th Cir. 1999).

2. Equitable Relief Is Improper Where an Adequate Remedy at Law Exists.

10 Plaintiff's request for injunctive relief must also be dismissed because Plaintiff has an
11 adequate remedy at law. Numerous courts have barred California consumer protection claims
12 seeking equitable relief at the motion to dismiss stage where, as here, "plaintiffs have alleged other
13 claims presenting an adequate remedy at law." *Munning v. Gap, Inc.*, 238 F. Supp. 3d 1195, 1203
14 (N.D. Cal. 2017); *Mandani v. Volkswagen Grp. of Am., Inc.*, 2019 WL 65286, at *7 (N.D. Cal.
15 2019) (dismissing without leave to amend CLRA and UCL claims seeking equitable relief where
16 plaintiff had an adequate remedy at law); *Falk v. Nissan N. Am., Inc.*, 2018 WL 2234303, at *9-10
17 (N.D. Cal. May 16, 2018) (barring plaintiffs "from seeking equitable relief" because they "pled
18 claims that provide for damages"). Here, Plaintiff asserts causes of action for product liability,
19 breach of warranty, and fraud-based claims, which, if proven, would provide Plaintiff with adequate
20 legal remedies. Therefore, her request for injunctive relief should be dismissed.

V. PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW.

A. Plaintiff Fails to Allege a Cognizable Injury and Therefore Cannot Establish an Essential Element of Each Cause of Action.

24 Each cause of action in the Amended Complaint fails for the same reason that Plaintiff lacks
25 standing—Plaintiff has not alleged a legally cognizable injury. Injury or damage is an essential
26 element of each of Plaintiff’s claims. *See Cisco Sys., Inc. v. STMicroelecs., Inc.*, 77 F. Supp. 3d
27 887, 895 (N.D. Cal. 2014) (damages is a required element of a cognizable claim for negligence);
28 *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 994 (Cal. 1991) (the doctrine of strict

1 liability requires “injury to a human being”); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965,
 2 1006-07 (1993) (medical monitoring “is an item of damage”); *Blennis v. Hewlett-Packard Co.*,
 3 2008 WL 818526, at *2 (N.D. Cal. Mar. 25, 2008) (a warranty claim requires “injury to the
 4 plaintiff”); *Anderson v. Deloitte & Touche*, 56 Cal. App. 4th 1468, 1474 (1997) (a claim for
 5 intentional misrepresentation/actual fraud requires “resulting damage”); *Fox v. Pollack*, 181 Cal.
 6 App. 3d 954, 962 (1986) (a required element of a claim for negligent misrepresentation is
 7 “damages”); Cal. Bus. & Prof. §§ 17204, 17535 (requiring “injury in fact” and loss of “money or
 8 property as a result of” violations of the UCL and FAL); Cal. Civ. Code §1780(a)(1) (requiring
 9 “[a]ctual damages” for violations of the CLRA); *Peterson v. Cellco P’ship*, 164 Cal. App. 4th 1583,
 10 1593 (2008) (an unjust enrichment claim requires defendant’s unjust enrichment at plaintiff’s
 11 expense). As such, (1) all of Plaintiff’s state law claims on behalf of the putative class fail for lack
 12 of standing; and (2) both Plaintiff’s putative class claims **and** individual personal injury claims fail
 13 because Plaintiff has not established an essential element of each claim.

14 **B. Plaintiff’s Claims for Fraud (Seventh and Eighth Causes of Action) Fail to**
 15 **Meet the Requisite Heightened Pleading Standard.**

16 Plaintiff alleges “Fraud – Intentional Misrepresentation” and “Fraud – Concealment.” Am.
 17 Compl. ¶¶ 111-132. Both of Plaintiff’s fraud claims fail because they do not meet the heightened
 18 pleading standard of Rule 9(b). Although Plaintiff asserts separate causes of action, they require
 19 proof of the same elements, and intentional misrepresentation and concealment are both bases for
 20 fraud. *See Ach v. Finkelstein*, 264 Cal. App. 2d 667, 674 (1968). Fraud is defined as “intentional
 21 misrepresentation, deceit, or concealment of a material fact known to the defendant with the
 22 intention on the part of the defendant of thereby depriving a person of property or legal rights or
 23 otherwise causing injury.” Cal. Civ. Code § 3294(c)(3). Intentional misrepresentation requires (1)
 24 misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity
 25 (scienter); (3) intent to defraud (i.e., to induce reliance); (4) justifiable reliance; and (5) resulting
 26 damages. *Deloitte & Touche*, 56 Cal. App. 4th at 1471.

27 Rule 9(b) requires a plaintiff to “state with particularity the circumstances constituting fraud
 28 or mistake.” Fed. R. Civ. P. 9(b). To satisfy Rule 9(b), a pleading must identify the “who, what,

1 when, where, and how of the misconduct charged, as well as what is false or misleading about the
 2 purportedly fraudulent statement, and why it is false.” *Grodzitsky v. Am. Honda Motor Co.*, 2013
 3 WL 690822, at *4 (C.D. Cal. Feb. 19, 2013) (dismissing fraud-based claims in putative class action
 4 for failure to comply with Rule 9(b)); *see also Stearns*, 763 F. Supp. 2d 1128 at 1159 (citing
 5 *Stickrath*, 527 F. Supp. 2d at 998). Additionally, where the fraud claim is against a corporate
 6 defendant, as here, a plaintiff has an even more stringent burden of pleading and must specifically
 7 allege five elements: “(1) the names of the persons who made the representations, (2) their authority
 8 to speak for the corporation, (3) to whom they spoke, (4) what was said or written, and (5) when it
 9 was said or written.” *Lazar v. Sup. Ct.*, 12 Cal. 4th 631, 645 (1996); *Aguirre v. Wells Fargo Bank*,
 10 N.A., 2015 WL 4065245, at *3 (C.D. Cal. July 2, 2015). None of these elements are alleged here.

11 The Amended Complaint lacks factual allegations of the circumstances of any purported
 12 misrepresentations or omissions by JJCI with the particularity required by Rule 9(b). The theory
 13 of liability underlying all of Plaintiff’s claims is that JJCI allegedly “fail[ed] to prevent the presence
 14 of benzene in the Sunscreens,” made “affirmative misrepresentations that portray the Sunscreens
 15 as safe,” and “omitt[ed] from the Sunscreens’ packaging and marketing materials information about
 16 the actual danger of the Sunscreens.” Am. Compl. ¶ 33. Despite these broad claims, Plaintiff does
 17 not provide any factual support with the specificity required by Rule 9(b).

18 For example, Plaintiff takes issue with the phrase “#1 Dermatologist Recommended” on the
 19 “packaging for the Sunscreens, as well Neutrogena’s website” solely because the “basis for this
 20 representation” is not also included on the packaging or website. *Id.* at ¶ 27. Yet, Plaintiff does
 21 not dispute the veracity of the representation, nor does she explain how this could constitute a false
 22 or misleading statement—other than her perceived belief that it “aims to portray the product as safe
 23 and healthy.” *Id.* Plaintiff then highlights the use of the word “clean” on the product label of a
 24 Neutrogena® sunscreen product that she claims to have used—without identifying the
 25 circumstances surrounding this representation (e.g., when she purchased or used the product, where
 26 she obtained it, and how frequently she used it). The label states: “lightweight clean feel.” *Id.* at
 27 ¶¶ 29-30. Plaintiff contends that the use of the word “clean” was intended to associate it with the
 28 Neutrogena® Ultra Sheer product line. In doing so, Plaintiff simply convolutes the meaning of the

1 term “clean” in this context because she does not dispute the actual representation itself (*i.e.*, that
 2 this particular product provides a “lightweight clean feel”), nor does she identify an actual
 3 misrepresentation or specify the circumstances surrounding any alleged misrepresentation.

4 Rule 9(b) also requires a plaintiff to allege “how the defendant obtained knowledge of the
 5 specific defect prior to the plaintiff’s purchase of the defective product.” *Stewart*, 304 F. Supp. 3d
 6 at 908 (citation omitted) (emphasis removed). In *Stewart*, the court found that the plaintiffs had
 7 failed to sufficiently allege how the defendant manufacturer would have been aware of customer
 8 complaints on a consumer affairs website or that “complaints or defects were reported to
 9 [defendant] during the period before Plaintiffs purchased the [product].” *Id.* at 908-09 (“[I]n cases
 10 where plaintiffs provided only conclusory allegations that the defendant [] had access to
 11 information about the defect or was in a ‘superior position to know the truth about the [product],’
 12 the claims were deemed deficient.”).

13 Here, Plaintiff does not identify how JJCI purportedly obtained knowledge of the alleged
 14 defect, nor does she allege when she actually purchased any sunscreen products such that she could
 15 demonstrate reliance on any alleged misrepresentations. Plaintiff makes sweeping assertions that
 16 JJCI “knew or reasonably should have known that the products were dangerous” and that JJCI “was
 17 aware of this danger and defect both before and after the Sunscreen products were sold[,]” but
 18 provides no facts whatsoever to support how or when JJCI obtained this purported knowledge. Am.
 19 Compl. ¶¶ 74-75. The Amended Complaint indicates that the Neutrogena® website was last visited
 20 on September 17, 2021 (*id.* at ¶ 28), but Plaintiff makes no effort to identify when she first saw
 21 these alleged misrepresentations. Rule 9(b) requires Plaintiff to allege how JJCI obtained
 22 knowledge about the purported defect *before* Plaintiff purchased the allegedly defective product.
 23 See *Stewart*, 304 F. Supp. 3d at 908 (citation omitted). Thus, Plaintiff has not plausibly alleged
 24 that JJCI had actual knowledge of the alleged defect in sunscreen products, let alone that it had any
 25 such knowledge before Plaintiff allegedly purchased a sunscreen product.

26 Finally, for the same reasons that Plaintiff has not adequately alleged the circumstances
 27 of—or even identified—any purported misrepresentations, she likewise does not plausibly allege
 28 reliance. See *id.* at 910 (finding plaintiffs’ “actual reliance allegations . . . inadequate because they

1 fail to explain what marketing materials, statements, or representations they' relied upon").
 2 Plaintiff cannot meet the heightened pleading standard of Rule 9(b) because she fails to identify
 3 what and when any alleged misrepresentation or concealment was made, when Plaintiff allegedly
 4 purchased sunscreen products, or that she relied on any such misrepresentation or concealment
 5 required to adequately allege her consumer protection claims.

6 **C. Plaintiff Does Not Plausibly State Claims for Negligent Misrepresentation
 7 (Ninth Cause of Action).**

8 A claim for negligent misrepresentation under California law requires a showing of:
 9 (1) "misrepresentation of a past or existing material fact, (2) without reasonable ground for
 10 believing it to be true, (3) with intent to induce another's reliance on the misrepresentation, (4)
 11 ignorance of the truth and justifiable reliance on the misrepresentation by the party to whom it was
 12 directed, and (5) resulting damages. *Ghalehtak v. Fay Serv., LLC*, 304 F. Supp. 3d 877, 888 (N.D.
 13 Cal. 2018) (Chen, J.) (citation omitted). "[U]nlike fraud, negligent misrepresentation requires a
 14 positive assertion to show a misrepresentation of a material fact; an omission or an implied assertion
 15 will not suffice." *Id.* at 888-89. "Although negligent misrepresentation does not inherently sound
 16 in fraud," a negligent misrepresentation claim is subject to the heightened pleading standards of
 17 Rule 9(b) if the plaintiff alleges a "unified fraudulent course of conduct" in support of the claim.
 18 *Id.* at 889; *see also Romo v. Wells Fargo Bank, N.A.*, 2016 WL 3523779, at *3 (N.D. Cal. June 28,
 19 2016) (Chen, J.) (applying same fraud analysis for plaintiff's negligent misrepresentation and fraud
 20 claims because they were "based on the same underlying facts").

21 Plaintiff's negligent misrepresentation claims are based on the same allegations as her
 22 intentional misrepresentation claims: (1) JJCI allegedly misrepresented that "the Sunscreen
 23 products were safe" (Am. Compl. ¶¶ 114-115 (fraud); *id.* at ¶¶ 135-136 (negligent
 24 misrepresentation)); (2) JJCI intended that consumers believe and rely on the representation (*id.* at
 25 ¶ 116 (fraud); *id.* at ¶ 138 (negligent misrepresentation)); (3) Plaintiff and the putative class
 26 members "reasonably relied" on the representation (*id.* at ¶ 117 (fraud); *id.* at ¶ 139 (negligent
 27 misrepresentation)); and (4) Plaintiff and the putative class members would not have used the
 28 "Sunscreen products had they known the truth about the dangers and risks posed by the Sunscreen

1 products" (*id.* at ¶ 120 (fraud); *id.* at ¶ 140 (negligent misrepresentation)). Because Plaintiff's
 2 negligent misrepresentation claims are based on the same allegations as her fraud claims, they are
 3 also subject to Rule 9(b)'s heightened pleading standard. *Romo*, 2016 WL 3523779, at *3. As set
 4 forth above, *supra* Section V.B, Plaintiff fails to allege, with particularity or otherwise, the
 5 circumstances surrounding the alleged misrepresentations or omissions that form the basis of her
 6 fraud and fraud-based claims; therefore, the negligent misrepresentation cause of action fails.

7 **D. Plaintiff's Consumer Protection Claims Under the UCL, FAL, and CLRA**
 8 **(Tenth, Eleventh, and Twelfth Causes of Action) Fail as a Matter of Law.**

9 Plaintiff does not allege plausible facts supporting the alleged violations of California's
 10 UCL, FAL, and CLRA. As an initial matter, Plaintiff fails to meet the statutory preconditions
 11 required to bring claims under the UCL and FAL, and does not sufficiently allege actual damages
 12 from purchasing and using Neutrogena® sunscreen products as required by the CLRA. Like the
 13 requirements for Article III standing, the UCL and FAL require Plaintiff to allege an "injury in
 14 fact," but also "loss of money or property as a result of" the alleged violation. *Kwikset Corp. v.*
 15 *Sup. Ct.*, 51 Cal. 4th 310, 321-22 (2011) (quoting Cal. Bus. & Prof. Code §§ 17204, 17535) (holding
 16 that the UCL and FAL standing requirements are identical). Similarly, the CLRA requires Plaintiff
 17 to allege actual damages caused by JJCI's alleged misconduct. *See* Cal. Civ. Code § 1780(a); *see*
 18 *also Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 156 (2010).

19 As discussed above, *supra* Section IV.B.1-3, Plaintiff has failed to plausibly allege "injury
 20 in fact" (UCL and FAL) or actual damages (CLRA). *See Otto v. Abbott Labs. Inc.*, 2014 WL
 21 12591475, at *3 (C.D. Cal. Apr. 22, 2014) ("The drafters of the UCL and FAL's standing provision
 22 expressly established that the "injury in fact" requirement is to be interpreted the same was as in
 23 Article III."). As to "loss of money or property as a result of" alleged violations of the UCL and
 24 FAL, this provision "has been interpreted to require some form of economic injury." *Id.* at *3
 25 (citation omitted). As the California Supreme Court has explained, the UCL and FAL's standing
 26 requirement is "'substantially narrower than federal standing under article III'" because "economic
 27 injury is 'but one among many types of injury in fact[.]'" *Id.* Although there are "innumerable
 28 ways in which economic injury from unfair competition may be shown," the Amended Complaint

1 is devoid of allegations demonstrating even one. Plaintiff makes a vague, passing reference to
 2 economic damages in her request for medical monitoring as a means to “compensate Plaintiff and
 3 members of the putative Class for their economic damages.” Am. Compl. ¶ 103. While Plaintiff
 4 asserts that she and the putative class “would not have purchased the Sunscreens” if they had
 5 “known and understood the true nature and quality of the Sunscreens[,]” Plaintiff does **not** allege
 6 that the unidentified “Sunscreens” were contaminated or defective, nor does she allege that they
 7 did not function as intended such that she did not receive the “benefit of the bargain.”

8 Plaintiff also fails to demonstrate that she complied with the CLRA’s pre-litigation notice
 9 requirements. Cal. Civ. Code § 1782(a)(1). Plaintiff does not plead she attempted to notify JJCI,
 10 “in writing” of “the particular alleged violations of § 1770, and demand that [JJCI] correct, repair,
 11 replace, or otherwise rectify the goods or services alleged to violate § 1770.” *Kellholtz v. Sup. Fireplace Co.*, 2009 WL 839076, at *2 (N.D. Cal. Mar. 30, 2009). As compliance with the CLRA’s
 12 notice requirement “is necessary to state a claim,” Plaintiff’s failure to assert any allegations
 13 demonstrating such compliance dooms her claims under the CLRA. *Id.* (citation omitted).

14 Moreover, Plaintiff’s consumer protection claims expressly rely on allegations that sound
 15 in fraud. *See, e.g.*, Am. Compl. ¶¶ 149, 151, 152, 158, 162, 168, 169, 170. Thus, Plaintiff must
 16 satisfy not only Rule 9(b)’s heightened pleading standard, but also allege actual knowledge of
 17 falsity, as required for common law fraud. *See Neu v. Terminix Int’l, Inc.*, 2008 WL 962096, at *5-
 18 6 (N.D. Cal. Apr. 8, 2008) (stating Rule 9(b) applies to UCL, FAL, and CLRA claims that sound
 19 in fraud); *see also Swearingen v. Late July Snacks LLC*, 2017 WL 4641896, at *2 (N.D. Cal. Oct.
 20 16, 2017) (Chen, J.) (noting that the phrase under the UCL “as a result of” is defined as ‘caused by’
 21 and requires a showing of a causal connection or reliance on the alleged misrepresentation” because
 22 “reliance is the causal mechanism of fraud” (citation omitted)).

23 In addition to actual knowledge, a plaintiff asserting claims under the CLRA and UCL based
 24 on allegedly misleading advertising or labeling must allege ““the particular circumstances
 25 surrounding [the] representations’ at issue.” *Watkins v. MGA Entm’t, Inc.*, 2021 WL 5865529, at
 26 *13 (N.D. Cal. Dec. 10, 2021). Plaintiff must “allege specific facts showing that they relied on the
 27 alleged misrepresentations or omissions.” *Id.* at *14 (citation omitted). Similarly, a claim under
 28

1 the FAL requires the plaintiff to demonstrate that he or she “suffered an injury due to his or her
 2 own actual and reasonable reliance on the purported misleading statements.” *Clorox Co. v. Reckitt*
 3 *Benckiser Grp. PLC*, 398 F. Supp. 3d 623, 646 (N.D. Cal. 2019).

4 All of Plaintiff’s consumer protection claims require Plaintiff to plead, with specificity,
 5 (1) the circumstances surrounding the alleged misrepresentations or misleading statements; (2)
 6 actual knowledge of falsity by JJCI; and (3) reliance by Plaintiff on the alleged misrepresentations
 7 or misleading statements. As set forth above, *supra* Section V.B, Plaintiff’s consumer protection
 8 claims fail to meet the heightened pleading standard of Rule 9(b) for the same reasons that her fraud
 9 claims fail, and should therefore be dismissed.

10 **E. The Medical Monitoring Claims (Fifth Cause of Action) Should Be Dismissed**
 11 **Because All Underlying Tort Claims Fail, and Plaintiff Fails to Establish**
 12 **Necessary and Reasonableness to Warrant Medical Monitoring Damages.**

13 Courts in this District follow the holding of *Potter v. Firestone Tire & Rubber Co.*, which
 14 found that medical monitoring damages are *only* available “when liability is established under
 15 traditional tort theories of recovery” and “*only* if the evidence establishes the necessity, as a direct
 16 consequence of the exposure in issue, for specific monitoring beyond that which an individual
 17 should pursue as a matter of general good sense and foresight.” *Potter*, 6 Cal. 4th at 1007 (citation
 18 omitted) (emphasis added); *see also Riva*, 82 F. Supp. 3d at 1057 (applying *Potter*).

19 Plaintiff fails to establish the necessity or reasonableness of the medical monitoring she
 20 seeks on behalf of the putative class. To recover medical monitoring damages, Plaintiff must
 21 demonstrate “both that the need for future monitoring is a ‘reasonably certain consequence’ of toxic
 22 exposure and that the monitoring sought is ‘reasonable.’” *Lockheed Martin Corp. v. Super. Ct.*, 29
 23 Cal. 4th 1096, 1107 (2003) (citing *Potter*, 6 Cal. 4th at 1009). The California Supreme Court
 24 identified five factors in determining the reasonableness and necessity of monitoring:

25 (1) the significance and extent of the plaintiff’s exposure to chemicals; (2) the
 26 toxicity of the chemicals; (3) the relative increase in the chance of onset of disease
 27 in the exposed plaintiff as a result of the exposure when compared to (a) the
 28 plaintiff’s chances of developing the disease had he or she not been exposed, and
 (b) the chances of the members of the public at large of developing the disease;
 (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical
 value of early detection and diagnosis.

1 *Potter*, 6 Cal. 6th at 1009. Considering the factors in turn, Plaintiff fails at each step. First, Plaintiff
 2 has not pled any facts establishing her exposure to benzene—*e.g.*, that she *actually* purchased or
 3 used any sunscreen products containing benzene, or any facts regarding the amount of sunscreen
 4 products she allegedly used, the duration of that use, or frequency of such use. Courts have held
 5 that mere evidence of exposure, without demonstrating sufficient severity of exposure, is not
 6 enough. *Riva*, 82 F. Supp. 3d at 1057 (citation omitted). Plaintiff does not plead or offer evidence
 7 of *any* exposure, let alone of “sufficient severity.” *Id.* Nor could she possibly plead such facts as
 8 to any unnamed, unidentified putative class member. *See* Am. Compl. ¶ 45.

9 Further, while Plaintiff contends that benzene is a “known human carcinogen” and cites
 10 sources that she purports establish a connection between benzene exposure and certain adverse
 11 health conditions, Plaintiff fails to establish that any benzene in sunscreen products is toxic.
 12 Instead, Plaintiff simply alleges that *some* batches of sunscreen products “*may* contain dangerous
 13 levels of benzene” while failing to establish exposure to *any* toxic level of benzene. *Id.* at ¶ 152
 14 (emphasis added); *see also Riva*, 82 F. Supp. at 1060.

15 Even accepting Plaintiff’s assertions as to the toxicity of benzene generally as true, Plaintiff
 16 still has not adequately pled her theory of injury—that is, “an increased risk of contracting latent
 17 illness and disease, including but not limited to cancer”—from benzene in sunscreen products. The
 18 Amended Complaint references the many sources of potential benzene exposure, including through
 19 occupational exposures and cigarette smoke, which are unrelated to sunscreen products. *See, e.g.*,
 20 Am. Compl. ¶ 9 (citing an American Cancer Society study regarding increased rate of AML found
 21 in workers exposed to high levels of benzene in chemical, shoemaking, and oil refining industries).
 22 Under California law, “causation [for personal injury claims] must be proven within a reasonable
 23 medical probability based upon competent expert testimony.” *Riva*, 82 F. Supp. 3d at 1061 (citing
 24 *Jones v. Ortho Pharm. Corp.*, 163 Cal. App. 3d 396, 402-03 (1985), for the proposition that the
 25 mere possibility of causing cancer alone is insufficient and that a “possible cause” of an injury only
 26 becomes “probable when, in the absence of other reasonable causal explanations, it becomes more
 27 likely than not that the injury was a result of its action”). Here, Plaintiff provides nothing more
 28 than speculation that benzene in various unidentified sunscreen products placed the putative class

1 at an “increased risk of contracting” unspecified latent illnesses—which “fails to create a credible
 2 inference of harm sufficient to warrant” medical monitoring damages. *Id.* at 1059.

3 Finally, while Plaintiff states that monitoring procedures for cancer exist, she fails to “show
 4 a need for ‘specific monitoring beyond that which an individual should pursue as a matter of general
 5 good sense and foresight.’” *Riva*, 82 F. Supp. 3d at 1061 (citing *Potter*, 6 Cal. 6th at 1009). She
 6 also fails to identify any specific type of recommended monitoring, and appears to suggest that
 7 monitoring for any and all “cancer and other illnesses” associated with exposure to any “chemicals,
 8 toxins and particulates” would be reasonable here. However, there is simply no evidence (or
 9 plausible allegation) of an increased risk of any “cancer or other illness” from potential exposure
 10 to benzene that may allegedly be contained in some sunscreen products.

11 Plaintiff has failed to establish that the alleged risk of “latent illness and disease, including
 12 but not limited to cancer” is credible and substantial such that medical monitoring of unspecified
 13 injuries would be warranted. Rather, the claims should be dismissed because Plaintiff has
 14 “effectively invited the Court to engage in an ‘ingenious academic exercise in the conceivable to
 15 explain how defendants’ actions caused [her] injury.’” *Id.* at 1053 (citation omitted).

16 **F. Plaintiff’s Breach of Warranty Claims (Sixth Cause of Action) Also Fail.**

17 Plaintiff fails to plausibly state claims for breach of warranty. To plead such a claim, the
 18 buyer must allege that the seller: (1) made an affirmation of fact or promise or provided a
 19 description of its goods; (2) the promise or description formed a part of the basis of the bargain;
 20 (3) the express warranty was breached; and the (4) the breach caused injury to the plaintiff. *Blennis*
 21 *v. Hewlett-Packard Co.*, 2008 WL 818526, at *2 (N.D. Cal. Mar. 25, 2008) (citation omitted).

22 Plaintiff does not plausibly state warranty claims for several reasons. First, Plaintiff does
 23 not specify “the exact terms of the warranty.” *Bem v. Stryker Corp.*, 2015 WL 6089819, at *2
 24 (N.D. Cal. Oct. 16, 2015). In *Bem*, the Court found that the plaintiff “failed to plead the specific
 25 language allegedly used by [defendant] to create the express warranty.” *Id.* It reasoned that
 26 allegations that the defendant “falsely represented to [p]laintiff that the [product] was a safe and
 27 effective option to his care and treatment” did not specify the terms of the warranty. *Id.* Likewise,
 28 in *Smith v. LG Electronics U.S.A., Inc.*, the Court found that statements that washing machines

1 ““were designed and manufactured for years of dependable service,” and “were safe for residential
 2 use and fit [for] everyday laundering needs” were insufficient because “vague statements regarding
 3 reliability, dependability, and safety are not actionable express warranties.” 2014 WL 989742, at
 4 *5 (N.D. Cal. Mar. 11, 2014).

5 Here, Plaintiff broadly claims that “[w]hen purchasing the Sunscreen, Plaintiff reviewed the
 6 accompanying labels and disclosures, and understood them as representations and warranties . . .
 7 that the Sunscreen was properly manufactured, free from defects, and safe for its intended use.”
 8 Am. Compl. ¶ 38. She further alleges that JJCI “represented, either by words or actions, that the
 9 Sunscreen products were safe.” *Id.* at ¶ 105. However, she does not identify those specific “words
 10 or actions,” relying instead on vague assertions of “representations and warranties” that the
 11 products were non-defective and safe—similar to the statements that courts in this District have
 12 already found do not create actionable express warranties—none of which identify the actual terms
 13 of the alleged warranties or pass Rule 8 muster.

14 Additionally, “privity of contract is required” in a breach of express warranty claim. *Bem*,
 15 2015 WL 6089819, at *2 (citation omitted) (finding that plaintiff “failed to allege any facts to show
 16 any [] privity existed between himself and [defendant]”). Plaintiff alleges no facts whatsoever to
 17 establish privity between herself and JJCI. Rather, she makes generalized allegations that “Plaintiff
 18 and members of the putative Class purchased [Sunscreens] from [JJCI],” but nowhere in the
 19 Amended Complaint does she provide any facts to support that she or any putative class member
 20 actually purchased sunscreen products from JJCI. Am. Compl. ¶¶ 36, 38, 160. Without such factual
 21 allegations, Plaintiff’s warranty claims also fail for lack of privity.

22 Moreover, despite reciting the remaining elements of a warranty claim (*i.e.*, a promise or
 23 description forming the basis of the bargain, breach, injury), Plaintiff provides no factual allegations
 24 to establish each of these elements. Without factual allegations identifying the actual products at
 25 issue—which were purportedly the subject of the alleged warranties—or that she relied on any
 26 such warranties, Plaintiff has not pled facts to demonstrate a breach of any express warranty, or a
 27 legally cognizable injury allegedly resulting from any such breach.

1 **G. Plaintiff's Unjust Enrichment Claims (Fourteenth Cause of Action) Should Be**
 2 **Dismissed Because an Adequate Remedy at Law Is Available.**

3 Plaintiff has not established that there is no adequate remedy at law available; rather, these
 4 claims are duplicative of Plaintiff's legal claims. *See Phillips v. Ford Motor Co.*, 2015 WL
 5 4111448, at *16 (N.D. Cal. July 7, 2015) (dismissing unjust enrichment claim because “[a] plaintiff
 6 seeking equitable relief in California must establish that there is no adequate remedy at law
 7 available” and plaintiff did not); *see also Shum v. Intel Corp.*, 630 F. Supp. 2d 1063, 1073 (N.D.
 8 Cal. 2009) (“There is little doubt that unjust enrichment is an equitable claim.”). For the reasons
 9 set forth above, *supra* Section IV.C.2, Plaintiff has not established that no adequate remedy at law
 10 exists, and therefore, her unjust enrichment claims also fail.

11 **H. Plaintiff Alleges No Plausible Facts To Support Her Punitive Damages Request.**

12 Plaintiff's prayer for punitive damages should be dismissed because it is unsupported by
 13 factual allegations demonstrating any malice, oppression, or fraud by JJCI. For a plaintiff to
 14 plausibly plead a claim for punitive damages, there must be a reasonable inference that the
 15 defendant acted knowingly or intentionally in oppressing, defrauding, and acting with malice
 16 towards Plaintiff. *See Iqbal*, 556 U.S. at 678 (requiring a plausibly pled complaint to demonstrate
 17 reasonable inference that defendant is liable for the alleged misconduct); Cal. Civ. Code § 3294(a);
 18 *see also Bouncing Angels, Inc. v. Burlington Ins. Co.*, 2017 WL 1294004, at *2 (C.D. Cal. Mar. 20,
 19 2017) (dismissing punitive damages claim because plaintiff “failed to plead sufficient facts to
 20 support a finding of malice, fraud or oppression”); *Whittlestone, Inc. v. HandiCraft Co.*, 618 F.3d
 21 970, 973-76 (9th Cir. 2010); *Kelley v. Corr. Corp. of Am.*, 750 F. Supp. 2d 1132, 1146-48 (E.D.
 22 Cal. 2010) (holding that, when a plaintiff makes a claim for punitive damages but provides no facts
 23 to support such a claim, dismissal of the claim under Rule 12(b)(6) is proper).

24 Malice is defined as “conduct which is intended by the defendant to cause injury to the
 25 plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious
 26 disregard of the rights or safety of others.” Cal. Civ. Code § 3294(c)(1). Despicable conduct is
 27 that which is so “base, vile or contemptible” that it would be despised and looked down upon by
 28 ordinary people. *Angie M. v. Sup. Ct.*, 37 Cal. App. 4th 1217, 1228 (1995). While oppression is

1 defined as “despicable conduct that subjects a person to cruel and unjust hardship in conscious
2 disregard of that person’s rights,” the standard of adequate pleading of malicious conduct also
3 applies to pleading of oppressive conduct. *Smith v. Sup. Ct.*, 10 Cal. App. 4th 1033, 1041 (1992).
4 Thus, a plaintiff must plausibly allege that defendants’ conduct was either (1) intended to cause
5 damages to plaintiff, or (2) that the alleged conduct was so “base, vile or contemptible” that it would
6 be despised and looked down upon by ordinary people. *Angie M.*, 37 Cal. App. 4th at 1228.

7 However, allegations of a willful act do not amount to pleading that a defendant acted with
8 the requisite wrongful specific intent to injure or in conscious disregard of a plaintiff's rights. *See*
9 *Kisesky v. Carpenters' Trust for So. Cal.*, 144 Cal. App. 3d 222, 234 (1983). Plaintiff bases her
10 claim for punitive damages on her unsupported assertion that JJCI somehow acted intentionally or
11 willfully. She does not provide any specificity or factual allegations of conduct that could qualify
12 as "base, vile or contemptible" conduct sufficient to warrant an award of punitive damages. Indeed,
13 Plaintiff's prayer for punitive damages cannot withstand a motion to dismiss when the Amended
14 Complaint fails to even allege that Plaintiff purchased or used any Neutrogena® sunscreen product
15 contaminated with benzene. Accordingly, the request for punitive damages should be dismissed.

16 | VI. CONCLUSION

17 For the foregoing reasons, JJCI respectfully requests that this Court dismiss Plaintiff's
18 Amended Complaint in its entirety pursuant to Federal Rules of Civil Procedure 12(b)(1) and
19 12(b)(6).

20 || Dated: December 20, 2021

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